FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 211

SOUTH EAST NATIONAL BANK,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

Petition for Writ of Certiorari

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Reports of Opinion of Court Below

The opinion of the United States Court of Appeals in this case is reported *sub nomine United States of America v. One 1957 Lincoln Premiere, Motor No. 57 WA 7757L*, 265 F. 2d 734. (See Appendix A.)

Statement of Jurisdiction

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on the 17th day of April, 1959. No petition for rehearing was filed.

The statutory provision believed to confer on this Court jurisdiction to review the judgment in question by writ of certiorari is Title 28 United States Code, Section 1254 (1).

Question Presented for Review

Is a forfeiture, under the provisions of Title 49 United States Code, Section 781 *et seq.*, of the interest of an owner-lienor bank in an automobile which has been used to illegally facilitate the transportation of narcotic drugs, a taking of the property of the owner-lienor without due process of law, contrary to the Fifth Amendment to the Constitution of the United States, when the owner-lienor was not only innocent of any fault, but also placed the wrongdoer in possession of the automobile without knowledge that he was suspected of narcotics laws violations; and which lack of knowledge was due in large part to the failure of the United States to provide adequate information facilities by which banks and other financial institutions might gain information concerning customers of theirs who are narcotics laws violators.

Constitutional Provisions and Statutes Involved

Constitution of the United States, Amendment 5. (See Appendix B.)

Title 49 United States Code, Sections 781, 782, 783, 784, 785, 786, 787, 788. (See Appendix C.)

Statement of the Case

This cause was instituted by the United States upon the filing of a libel against One 1957 Lincoln Premiere Motor No. 57 WA 7757L seeking the forfeiture of that automobile for having been used to facilitate the trans-

portation, carriage, conveyance, concealment, receipt, possession, purchase, sale, barter, exchange or giving away of a contraband article, to wit: one ounce of heroin.

The petitioner in the present proceedings, the South East National Bank, a National Banking Association organized under the Laws of the United States, filed an answer to the libel in the nature of an intervening claim. A hearing was had in the United States District Court for the Northern District of Illinois, Eastern Division, and upon the conclusion thereof, the District Court held that the United States had not established probable cause for the institution of the libel. The United States appealed this judgment to the United States Court of Appeals for the Seventh Circuit. That Court reversed the District Court and remanded the cause with directions to the District Court to enter judgment of forfeiture. It is to review that judgment of the United States Court of Appeals for the Seventh Circuit that this petition is brought.

The District Court made findings of fact based upon the evidence. Those findings were not set aside by the Court of Appeals which held as a matter of law that the government had established probable cause.

The findings of fact fairly summarize the evidence and therefore we set them forth here as the statement of the case:

The Court Finds As Follows:

1. That on June 26, 1957, certain police officers of the City of Chicago in the company of another person caused that person to place a telephone call to one Melvin Harris at the latter's place of business.

2. That after said call, certain of these officers observed Harris leave his place of business and enter the defendant automobile.

3. That the officers followed Harris to a building located on the south side of Chicago, Illinois.

4. That Harris parked his car and went into said building while the officers waited outside.

5. That Harris then left the building and entered the subject automobile and the officers resumed their pursuit.

6. That they lost the car around 55th Street and Woodlawn Avenue in the City of Chicago and drove to 62nd Street and Stony Island Avenue where they knew Harris was to be waiting.

7. That when they came upon the scene at 62nd and Stony Island several minutes after losing Harris, the subject automobile was parked and Harris was standing nearby.

8. That the police officers placed Harris under arrest and made a search of his person.

9. That on Harris' person was found one ounce of a narcotic substance known as heroin which did not bear tax-paid revenue stamps of the United States of America.

10. That no narcotics or other contraband were in the defendant automobile at the time that Harris was placed under arrest.

11. That defendant automobile was sold to Melvin Harris by Robert Esserman, an automobile dealer in Chicago who had previously sold many automobiles to Harris for both his personal use and business use as a taxicab operator and drugstore owner. That Esserman had caused to be made several credit and character checks of Harris and had never found anything derogatory of either the credit or character of Harris and that he would not have sold any of the automobiles including the defendant automobile

in this case to Harris if he had known that Harris was under suspicion of carrying on an illegal narcotics business.

12. That the automobile in question in this case was sold to Harris under a conditional sales contract and that contract was assigned by Esserman to the Southeast National Bank, a national banking association having its place of business in Chicago, Illinois.

13. That this bank had had other business transactions with Harris both as a depositor and in automobile financing transactions. The bank had also caused to be made several credit and character checks of Harris and had never found anything derogatory concerning either his credit or character. The bank would not have financed the automobile had it been known that Harris had been engaged in illegal narcotics transactions.

14. That the great number of financial institutions in the Chicago area which finance the sales of automobiles and the short hours allotted by the Federal Narcotics Bureau for giving information as to suspected persons to those financial institutions make it almost impossible for those institutions to find out any information concerning prospective automobile buyers in regard to their status with the narcotics bureau. Furthermore the only information which is ever divulged by the bureau is that the person is under suspicion, and even that information is not always given to the financing institution.

15. The Southeast National Bank is the owner of the defendant automobile.

The basis for federal jurisdiction in the United States District Court for the Northern District of Illinois, is Title 28 United States Code, Section 1345. This being a civil proceeding instituted by the United States.

Reasons for Granting Writ.

This petition requests the Court to review in this case a question which is of increasing importance throughout the nation. That is, what is the status of an institution which lends money to the purchaser of an automobile retaining title as security, where the automobile is guilty of a violation of the act set forth in 49 U.S.C. 781 *et seq.* This act provides for the seizure and forfeiture to the United States of any vessel, vehicle or aircraft which, in essence, aids the illegal possession or sale of narcotic drugs or the use of weapons in contravention of the National Firearms Act. Because of the growing dependence of the national economy upon credit, financing institutions which extend credit to the public for the purchase of automobiles are daily faced with the problem of loaning money to individuals who are or may in the future be suspected of having violated the narcotics laws of the United States. In the event that an automobile purchased in this manner is used to violate the statute under consideration in the present case, the lending institution is threatened with the loss of its security in the credit transaction. These companies are certainly innocent of any violation of these laws. Nevertheless their property is taken from them by the United States because persons, whose automobiles they financed in good faith have caused the automobile to violate the aforementioned statute. More important than mere good faith, is the fact that, as in the present case, the United States is reluctant to disclose any information to the financing institutions as to whether persons to whom they are about to lend money, are under suspicion of having violated the narcotics law.

Under such circumstances a seizure and forfeiture of an automobile is a deprivation of the property of the financing

institution without due process of law. As far as we know, this Court has not directly decided the question of the constitutionality of such an application of the act involved in this case. We are not, however, unmindful of the case of *J. W. Goldsmith, Jr.—Grant Co. v. United States*, 254 U.S. 505, which held the forfeiture provisions of Section 3450 of the Revised Statutes to be Constitutional.

We believe that the changes which have occured in the over thirty-eight years which have passed since the opinion in the *Goldsmith-Grant* case necessitate a reexamination of that decision.

The facts of the *Goldsmith-Grant* case are so very similar to those in this case as to make them almost identical insofar as the relation between the claimant and the ones who used the automobile in an unlawful manner, is concerned.

The Grant Co. was the seller of the automobile which was sought to be forfeited. J. G. Thompson was a taxicab operator to whom the Grant Co. had sold the automobile, retaining title for the unpaid purchase price. The automobile had been used in the removal and for the deposit and concealment of 58 gallons of distilled spirits upon which a tax was imposed by the United States; the tax had not been paid. A jury found the automobile guilty and Grant Co. and J. W. Goldsmith, Jr., the former's surety, were adjuged to pay the United States the sum of $800.00, the value of the automobile.

In reviewing that judgment this Court felt impelled to follow what were considered to be the controlling cases and to apply a forfeiture provision of the statute which was said by the court to be "too firmly fixed in the punitive and remedial jurisprudence of the country to be now displaced." (254 U.S. 505, 511.) This was not done, however, without some conviction that such application of the statute

"violate[d] that justice which should be the foundation of the due process of law required by the Constitution." (254 U.S. 505, 510.)

We ask the Court to reconsider the doctrine of the *Goldsmith-Grant* case. Furthermore we ask the court to determine the completely new question of whether an automobile or other object may be forfeited when the party whose property has been seized has attempted to maintain the extreme degree of care imposed upon him by the statute and is restrained from doing so by the United States.

As to the *Goldsmith-Grant* case we submit that the cases cited in support of its rule are not applicable in the situation wherein the owner of the property sought to be forfeited retains no control over its use. In *Dobbins Distillery* v. *United States*, 96 U.S. 395, relied upon by the Court in the *Goldsmith-Grant* case, the Court impliedly if not expressly held that the owner of real property upon which a distillery is erected is required to exercise a high degree of care in regard to that property in order to insure that the property and distillery equipment thereupon is not being used for an illegal purpose. In that case, the owner had notice that an enterprise which might conceivably violate the revenue laws was being carried on. The institution which finances the purchase of an automobile does not have before it such obvious *indicia* of a possible illegal enterprise. In the case at bar, the purchaser of the automobile was known to both the seller of the automobile and the bank which financed the sale as a taxicab operator and liquor store owner. He had had prior business dealings with both the seller and the bank and they had no knowledge that he might be engaged in an illicit business. Nor, as the district court found, was there any opportunity for

them to discover through proper channels, these illicit activities.

The *Dobbins Distillery* case itself is based upon a prior ruling of the Court in the case of *United States* v. *The Brig Malek Adhel*, 2 How. 210. This involved a libel in admiralty by the United States for the forfeiture of a ship used for piracy. In claiming the ship, the owners argued that they were innocent and that any acts of piracy were carried on by the captain and crew without the knowledge or consent of the owners. The court speaking through Mr. Justice Story, held in effect that the owners were responsible for the appointment of the captain and other officers and the crew of the ship and thus were held to a duty of assuring that the captain and crew of the ship did not engage in piratical ventures:

> "... It is not an uncommon course in the admiralty, acting under the law of nations, to treat the vessel in which or by which, or by the master or crew thereof, a wrong or offence has been done as the offender, without any regard whatsoever to the personal misconduct or responsibility of the owner thereof. And this is done from the necessity of the case, as the only adequate means of suppressing the offence or wrong, or insuring an indemnity to the injured party. The doctrine, also is familiarly applied to cases of smuggling and other misconduct under our revenue laws: and has been applied to kindred cases, such as cases arising on embargo and non-intercourse acts. In short, the acts of the master and crew, in cases of this sort, bind the interest of the owner of the ship, whether he be innocent or guilty: and he impliedly submits to whatever the law denounces as a forfeiture attached to the ship by reason of their unlawful or wanton wrongs." (2 How. 210, 233, 234.)

A prior case decided by Mr. Chief Justice Marshall at circuit was quoted with approval by Justice Story and gives

further evidence that a principle of agency guided the admiralty forfeitures:

> "This is not a proceeding against the owner; it is a proceeding against the vessel for an offense committed by the vessel; which is not the less an offense, and does not the less subject her to forfeiture, because it was committed without the authority and against the will of the owner. It is true that inanimate matter can commit no offense. But this body is animated and put in action by the crew, who are guided by the master. The vessel acts and speaks by the master: She reports herself by the master. It is therefore not unreasonable that the vessel should be affected by this report." *United States* v. *The Schooner Little Charles*, 1 Brock. 347, 354, Fed. Cas.

Thus from earliest times the basis of the forfeiture in admiralty was an implied submission of the owner to the acts of the master and crew which in turn arose from the real agency created by the owner in the master and crew.

In *Dobbins Distillery* v. *United States*, 96 U.S. 395, the doctrine was broadened to include not only acts wherein there was an agency created by the owner of the property sought to be forfeited but acts wherein the property was used with the consent of the owner:

> "Nor is it necessary that the owner of the property should have knowledge that the lessee and distiller was committing fraud on the public revenue, in order that the information of forfeiture should be maintained. If he knowingly suffers and permits his land to be used as a site for a distillery, the law places him on the same footing as if he were the distiller and the owner of the lot where the distillery is located; just as if the the distiller was the owner." (96 U.S. 395, 399.)

The particular statute involved in the *Dobbins Distillery* case was later construed in *United States* v. *Stowell*, 133

U.S. 1, where the Court appeared to limit forfeitures to that personal property which was knowingly placed in the possession of a person engaged in the operation of a regulated enterprise:

> ". . . The second provision must therefore extend to some property not fit or intended to be used in distilling spirits. In order to give it such effect as will show any reason for its insertion in the statute, it must be construed to intend, at least, that all personal property which is knowingly and voluntarily permitted by its owner to remain on any part of the premises, and which is actually used, either in the unlawful business, or in any other business openly carried on upon the premises, shall be forfeited, even if he has no participation in or knowledge of the unlawful acts or intentions of the person carrying on business there; and that persons who entrust their personal property to the custody and control of another at his place of business shall take the risk of its being subject to forfeiture if he conducts, or consents to the conducting of, any business there in violation of the revenue laws, without regard to the question whether the owner of any particular article of such property is proved to have participated in or connived at any violation of those laws. The present case does not require us to go beyond this; or to consider whether the sweeping words 'all personal property' must be restricted by implication in any other respect, for instance, as to personal effects having no connection with any business, or as to property stolen or otherwise brought upon the premises without the consent of the owner."

"The significance of the omission of all restrictions in point of ownership, and in point of fitness or intention for the unlawful use, in the second provision concerning personal property, is clearly brought out by contrasting that provision with the provisions immediately following it, concerning real estate.

"The third provision forfeits only 'all the right, title or interest of' the distiller 'in the lot or tract of land

on which the distillery is situated.' And the fourth provision forfeits only 'all right, title and interest therein of every person who knowingly has suffered or permitted the business of a distiller to be there carried on, or has connived at the same.'

"Congress has thus clearly manifested it intention that the forfeiture of land and buildings shall not reach beyond the right, title and interest of the distiller, or of such other persons as have consented to the carrying on the business of a distiller upon the premises.

"In the case, on which the attorney for the United States much relied, of *Dobbins Distillery* v. *United States*, 96 U.S. 395, the jury, under the instructions given them at the trial, had found that the owner of the distillery, whose title was held to be included in the forfeiture for unlawful acts of his lessee, had leased the property for the purpose of a distillery, which brought the case within the provisions of the act under which the condemnation was sought, corresponding to the fourth provision now under consideration." (133 U.S. 1, 13, 14, 15.)

Two more cases are of importance in this area although they represent views, in one instance, of a minority of the court which decided the case, and, in the second instance, of a court which later overruled itself.

In *United States* v. *Mincey*, 254 Fed. 287 (C.C.A. 5, 1918), Circuit Judge Batts dissented as follows:

"The holding in *United States* v. *Stowell*, 133 U.S. 1, that buildings and fixtures erected for distilling, and leased and used for that purpose, may be forfeited for the failure of the lessee to comply with the revenue laws, may be justified by the owners destination for a business necessarily under strict regulations, with knowledge of the consequences of their infraction.

"To hold that section 3450, R.S. U.S. (Comp. St. 1916, § 6352) subjects property designed for and used in transportation generally to forfeiture when used in carrying distilled spirits upon which the tax has

not been paid, by one to whom it has been let for an innocent and proper purpose, the owner being without fault, is to ascribe to the legislative department an indifference to fundamental principles not warranted so long as another construction is possible.

"That the powers incidental to taxation are necessarily strong, and that in their practical administration inequalities and injustices almost necessarily result, can afford no justification for the basic rights which the government was formed to protect." (254 Fed. 287, 288, 289.)

The second of the cases which we wish to bring to the attention of the Court is *United States* v. *Two Barrels Whiskey et al.*, 96 Fed. 479, (C.C.A. 4, 1899). After examining the authorities at some length the court concluded its opinion:

"It is not to be assumed that the government desires to take the property of a citizen charged with no crime without some proof that he has knowingly or negligently contributed to its commission, and undoubtedly the secretary of the treasury, upon the facts of this case as agreed upon, and as found by the trial court, would, in the exercise of his discretion, remit the forfeiture; but, if this man has rights, a court of justice is the place to maintain them, and he should not be compelled to ask them of executive officers as a favor. The judgment of the court below is affirmed." (96 Fed. 479, 484.)

The court which overruled the above case did so on the basis that there had been a misconstruction of the *Stowell* case. However as we have attempted to demonstrate above, the *Stowell* case intimates that personal property should not be forfeited unless the owner placed it in the possession of the wrongdoer with knowledge that the wrongdoer was carrying on a business regulated by the United States. This same construction was placed upon that case by Judge Batts in the *Mincey* case cited above.

Applying the above authorities to the case at bar, it is clear that the claimant bank did not have knowledge of the illicit possession of narcotic drugs by Melvin Harris. As the District Court found, the bank's only knowledge of Harris was as a reputable business man. Moreover, and most important, the District Court found that the United States did not provide an adequate information system by which financial institutions could obtain information concerning the narcotic law violations of prospective automobile purchasers. Thus, the real fault lies not with the claimant but with the United States. When a person, natural or corporate, does not wish to finance the automobile of one illegally trafficking in narcotic drugs but is kept in ignorance by the United States, which fails to provide the necessary information, it is a complete denial of due process of law for the United States to demand the forfeiture of the interest of the claimant.

Analogous are the cases of *Jencks* v. *United States*, 353 U.S. 657, *United States* v. *Beckman*, 155 F. 2d 580, *United States* v. *Andolschek*, 142 F. 2d 503. Although the rule there expressed specifically concerned criminal cases, it should be applicable to actions to enforce a penalty. Quoting from *United States* v. *Reynolds*, 345 U.S. 1, 12, this Court said in the *Jencks* case:

> "... The rationale of the criminal cases is that, since the Government which prosecutes an accused also has the duty to see that justice is done, it is unconscionable to allow it to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense."

From this the rule may be derived that it is unconscionable to permit the United States to contribute to the innocence of a party and then cause the forfeiture of prop-

erty of that person innocently placed in the possession of the wrongdoer. If there is any reason for the government to refuse information concerning narcotics laws violations, and there is no reason to deny this right of the government, the government must decide whether or not it would rather divulge information concerning a law violator and seize an automobile financed in spite of such information or not divulge such information and not seek forfeiture.

CONCLUSION.

Because the importance of the problems presented above we respectfully submit that this petition for writ of certiorari be granted.

Respectfully submitted,

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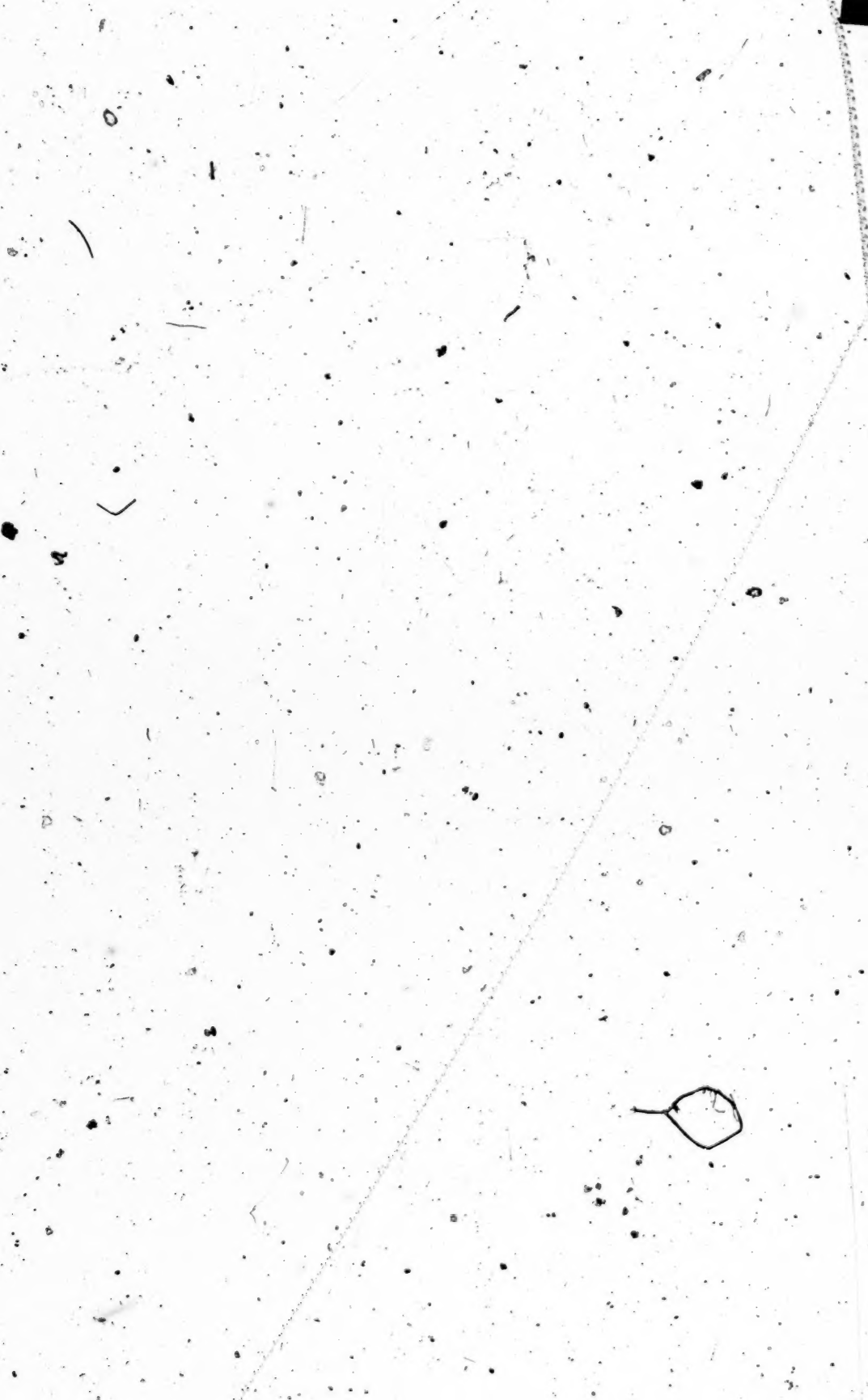

APPENDIX A.

In the

United States Court of Appeals

For the Seventh Circuit

SEPTEMBER TERM, 1958—APRIL SESSION, 1959

No. 12532
UNITED STATES OF AMERICA,
Plaintiff-Appellant,
v.
ONE 1957 LINCOLN PREMIERE, MOTOR NO. 57, WA 7757L,
Defendant,
v.
SOUTHEAST NATIONAL BANK,
Claimant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

April 17, 1959

Before SCHNACKENBERG, PARKINSON and KNOCH, *Circuit Judges:*

PARKINSON, *Circuit Judge*. On June 26, 1957, one James Norwood was arrested by officers of the Chicago Police Narcotic Bureau in connection with an investigation of narcotic law violations. Norwood named the person from whom he had received the narcotics in his possession at the time of his arrest. Norwood agreed to cooperate in the apprehension of the supplier and Officer Sims directed

him to call Melvin Harris. In the presence of Officers Sims and Bryson, Norwood placed a telephone call to Metropolitan Sundries & Liquors, a store located on the southeast corner of 45th and South Park Avenue in Chicago. The call was made from a restaurant diagonally across the intersection. Norwood said: "This is Norwood. I want the same thing that I got yesterday." Then, after a short pause, he said: "Yes, I have the money."

Norwood and Officers Sims and Bryson then left the restaurant. Sims and Norwood got into a waiting automobile with Officer Bingham and drove directly to Norwood's home at 1524 East 62nd Street in Chicago arriving there about 10:00 P.M. Officers Bryson and Urso remained at the corner of 45th and South Park Avenue. About 10:30 P.M. a phone call was received by Norwood at his home. Officers Sims and Bingham listened in with Norwood's permission. The telephone caller said: "This is Melvin calling back. Meet me at 62nd and Stony Island at eleven o'clock. Be there on time because I don't want to hang around there too long." Norwood said: "I'll be there." Melvin then said: "Do you have the bread?" ("Bread" meaning money in narcotic jargon.) Norwood said: "Yes, I have the money, and I'll be at 62nd in my car at eleven o'clock."

Between 10:30 and 10:45 P.M., Officers Urso and Bryson, who were stationed at the corner of 45th and South Park Avenue, saw Melvin Harris, who was known to both officers, get into the defendant's Lincoln Premiere automobile and drive away. They followed Harris to 1114 East 45th Street where he parked and went indoors. No one approached the defendant automobile and in about four or five minutes Harris returned and drove on. Urso and Bryson followed him east on 45th Street to Woodlawn and south on Woodlawn to 55th Street. There they lost Harris

in traffic. They then immediately proceeded to 62nd and Stony Island arriving there in about two or three minutes. Harris parked defendant automobile between 61st and 62nd on the west side of Stony Island. Urso and Bryson pulled up behind defendant automobile. Urso arrested Harris, who was then standing on the sidewalk beside the automobile. Harris was searched and found to have narcotics unlawfully in his possession.

The following day Harris was interviewed by Federal Narcotics Agent Newey. Harris told Newey that he had been arrested the night before with narcotics on his person and had driven the defendant automobile to 62nd and Stony Island prior to his arrest. Agent Newey then seized the defendant automobile pursuant to Title 49 U.S.C.A. § 781 *et seq.*

Thereafter libel for forfeiture was filed. The claimant-appellee Southeast National Bank, assignee of the conditional vendor, asserted claim to the defendant automobile.

At the conclusion of the evidence on a bench trial, the District Court granted a motion for judgment in favor of the claimant; entered findings of fact and conclusions of law, wherein it concluded "that the government did not establish probable cause for the seizure of the defendant automobile," dismissed the libel; and ordered the automobile released to the claimant bank. This appeal followed.

The only question presented by this appeal is whether the evidence is sufficient to establish probable cause for the institution of the libel proceedings. 19 U.S.C.A. § 1615.

The undisputed facts are that Melvin Harris unlawfully had narcotics in his possession when he was arrested at 62nd and Stony Island. It is obvious from the testimony set forth that he had the contraband with him when he left 45th and South Park Avenue or picked it up at 1114 East

45th Street enroute. Thus Harris used defendant automobile to facilitate the transportation of contraband within the meaning of 49 U.S.C.A. § 781. Even if we were to adopt the theory that the narcotics were received by or delivered to Harris after he arrived at 62nd and Stony Island, which is highly improbable to say the least, he would still have utilized the defendant automobile to facilitate the receipt or possession of the narcotics. There is no other possibility. Accordingly it is immaterial whether we adopt the theory of the Government or the claimant, in either event the evidence clearly shows that Melvin Harris used the defendant automobile in violation of the statute. The conclusion of the District Court that probable cause for the seizure of the defendant automobile is not shown by the evidence is clearly erroneous. *United States v. One 1949 Pontiac Sedan*, 7 Cir., 1952, 194 F. 2d 756.

Although the claimant bank concedes that innocence and good faith is not a defense to forfeiture it argues that such innocence "places a greater burden upon the government in a case where circumstantial evidence is relied upon to prove probable cause." It is significant that claimant cites no authority in support. The reason is self-evident. There is none. Even if such be the law, and we are not so holding, the evidence in this record is so clear and convincing that we believe that burden has been met.

Judgment reversed and cause remanded with instructions to enter judgment of forfeiture in favor of the libellant.

A true Copy:
Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B.

CONSTITUTION OF THE UNITED STATES, FIFTH AMENDMENT:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled, in any criminal case, to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation.

APPENDIX C.

TITLE 49, UNITED STATES CODE:

§ 781. *Unlawful use of vessels, vehicles, and aircrafts; contraband article defined.*

(a) It shall be unlawful (1) to transport, carry, or convey any contraband article in, upon, or by means of any vessel, vehicle, or aircraft; (2) to conceal or possess any contraband article in or upon any vessel, vehicle, or aircraft, or upon the person of anyone in or upon any vessel, vehicle, or aircraft; or (3) to use any vessel, vehicle, or aircraft to facilitate the transportation, carriage, conveyance, concealment, receipt, possession, purchase, sale, barter, exchange, or giving away of any contraband article.

(b) As used in this section, the term "contraband article" means—

(1) Any narcotic drug which has been or is possessed with intent to sell or offer for sale in violation of any laws or regulations of the United States dealing therewith; or which has been acquired or is possessed, sold, transferred, or offered for sale, in violation of any laws of the United States dealing therewith; or which has been acquired by theft, robbery, or burglary and carried or transported within any Territory, possession, or the District of Columbia, or from any State, Territory, possession, the District of Columbia, or the Canal Zone, to another State, Territory, possession, the District of Columbia, or the Canal Zone; or which does not bear appropriate tax-paid internal-revenue stamps as required by law or regulations;

(2) Any firearm, with respect to which there has been committed any violation of any provision of the National

Firearms Act or any regulation issued pursuant thereto; or

(3) Any falsely made, forged, altered, or counterfeit coin or obligation or other security of the United States or of any foreign government; or any material or apparatus, or paraphernalia fitted or intended to be used, or which shall have been used, in the making of any such falsely made, forged, altered, or counterfeit coin or obligation or other security. (Aug. 9, 1939, ch. 618, § 1, 53 Stat. 1291; Aug. 9, 1950, ch. 655, 64 Stat. 427.)

§ 782. *Seizure and forfeiture.*

Any vessel, vehicle, or aircraft which has been or is being used in violation of any provision of section 781 of this title, or in, upon, or by means of which any violation of said section has taken or is taking place, shall be seized and forfeited: *Provided*, That no vessel, vehicle, or aircraft used by any person as a common carrier in the transaction of business as such common carrier shall be forfeited under the provisions of this chapter unless it shall appear that (1) in the case of a railway car or engine, the owner, or (2) in the case of any other such vessel, vehicle, or aircraft, the owner or the master of such vessel or the owner or conductor, driver, pilot, or other person in charge of such vehicle or aircraft was at the time of the alleged illegal act a consenting party or privy thereto: *Provided further*, That no vessel, vehicle, or aircraft shall be forfeited under the provisions of this chapter by reason of any act or omission established by the owner thereof to have been committed or omitted by any person other than such owner while such vessel, vehicle, or aircraft was unlawfully in the possession of a person who acquired possession thereof in violation of the criminal laws of the United States, or of any State. (Aug. 9, 1939, ch. 618, § 2, 53 Stat. 1291.)

§ 783. *Designation of officers by Secretary of Treasury; duties of officers.*

The Secretary of the Treasury is empowered to authorize, or designate, officers, agents, or other persons to carry out the provisions of this chapter. It shall be the duty of any officer, agent, or other person so authorized or designated, or authorized by law, whenever he shall discover any vessel, vehicle, or aircraft which has been or is being used in violation of any of the provisions of this chapter, or in, upon, or by means of which any violation of this chapter has taken or is taking place, to seize such vessel, vehicle, or aircraft and to place it in the custody of such person as may be authorized or designated for that purpose by the Secretary of the Treasury, to await disposition pursuant to the provisions of this chapter and any regulations issued hereunder. (Aug. 9, 1939, ch. 618, § 3, 52 Stat. 1292.)

§ 784. *Application of related laws.*

All provisions of law relating to the seizure, summary and judicial forfeiture, and condemnation of vessels and vehicles for violation of the customs laws; the disposition of such vessels and vehicles or the proceeds from the sale thereof; the remission or mitigation of such forfeitures; and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to seizures and forfeitures incurred, or alleged to have been incurred, under the provisions of this chapter, insofar as applicable and not inconsistent with the provisions hereof: *Provided*, That such duties as are imposed upon the collector of customs or any other person with respect to the seizure and forfeiture of vessels and vehicles under the customs laws shall be performed with respect to seizures and forfeitures of vessels, vehicles, and aircraft

under this chapter by such officers, agents, or other persons as may be authorized or designated for that purpose by the Secretary of the Treasury. (Aug. 9, 1939, ch. 618, § 4, 53 Stat. 1292.)

§ 785. *Availability of appropriations.*

Any appropriation which has been or shall hereafter be made for the enforcement of the customs, narcotics, counterfeiting, or internal revenue laws, and the provisions of the National Firearms Act shall be available for the defraying of expenses of carrying out the provisions of this chapter. (Aug. 9, 1939, ch. 618, § 5, 53 Stat. 1292.)

§ 786. *Construction with other laws.*

The provisions of this chapter shall be construed to be supplemental to, and not to impair in any way existing provisions of law imposing fines, penalties, or forfeitures; or providing for the seizure, condemnation, or disposition of forfeited property or the proceeds thereof; or authorizing the remission or mitigation of fines, penalties, or forfeitures. (Aug. 9, 1939, ch. 618, § 6, 53 Stat. 1292.)

§ 787. *Definitions.*

When used in this chapter—

(a) The term "vessel" includes every description of watercraft or other contrivance used, or capable of being used, as means of transportation in water, but does not include aircraft;

(b) The term "vehicle" includes every description of carriage or other contrivance used, or capable of being used, as means of transportation on, below, or above the land, but does not include aircraft;

(c) The term "aircraft" includes every description of craft or carriage or other contrivance used, or capable of being used, as means of transportation through the air;

(d) The term "narcotic drug" means any narcotic drug, as now or hereafter defined by the Narcotic Drugs Import and Export Act, the internal-revenue laws, or the regulations issued thereunder; or marihuana as now or hereafter defined by the Marihuana Tax Act of 1937 or the regulations issued thereunder;

(e) The term "firearm" means any firearm, as now or hereafter defined by the National Firearms Act or the regulations issued thereunder; and

(f) The words "obligation or other security of the United States" are used as now or hereafter defined in section 8 of Title 18. (Aug. 9, 1939, ch. 618, § 7, 53 Stat. 1292; Oct. 31, 1951, ch. 655, § 55 (b), 65 Stat. 729.)

§ 788. *Rules and regulations.*

The Secretary of the Treasury shall prescribe such rules and regulations as may be necessary to carry out the provisions of this chapter. (Aug. 9, 1939, ch. 618, § 8, 53 Stat. 1293.)

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 211

SOUTH EAST NATIONAL BANK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. 17–20) *sub nom. United States* v. *One 1957 Lincoln Premiere* is reported at 265 F. 2d. 734.

JURISDICTION

The judgment of the Court of Appeals was entered on April 17, 1959. The petition for a writ of certiorari was filed on July 15, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner may challenge the constitutionality of the forfeiture provisions of 49 U.S.C. 781

et seq. on the ground that it could not have found out about the narcotics reputation of the purchaser of the car it had financed, where it failed to check with the narcotics bureau concerning the purchaser and where the issue was not raised in the lower courts.

STATUTES INVOLVED

49 U.S.C. 781 provides in pertinent part:

> (a) It shall be unlawful (1) to transport, carry, or convey any contraband article in, upon, or by means of any vessel, vehicle, or aircraft; (2) to conceal or possess any contraband article in or upon any vessel, vehicle, or aircraft, or upon the person of anyone in or upon any vessel, vehicle, or aircraft; or (3) to use any vessel, vehicle, or aircraft to facilitate the transportation, carriage, conveyance, concealment, receipt, possession, purchase, sale, barter, exchange, or giving away of any contraband article.
>
> (b) As used in this section, the term "contraband article" means—
>
> (1) Any narcotic drug which has been or is possessed with intent to sell or offer for sale in violation of any laws or regulations of the United States dealing therewith; or which has been acquired or is possessed, sold, transferred, or offered for sale, in violation of any laws of the United States dealing therewith; or which has been acquired by theft, robbery, or burglary and carried or transported within any Territory, possession, or the District of Columbia, or from any State, Territory, possession, the District of Columbia, or the Canal Zone, to another State, Territory, possession, the Dis-

trict of Columbia, or the Canal Zone; or which does not bear appropriate tax-paid internal-revenue stamps as required by law or regulations;

* * * * * *

49 U.S.C. 782 provides in pertinent part:

> Any vessel, vehicle, or aircraft which has been or is being used in violation of any provision of section 781 of this title, or in, upon, or by means of which any violation of said section has taken or is taking place, shall be seized and forfeited: * * *

STATEMENT

On October 15, 1957, in the United States District Court for the Northern District of Illinois, the United States filed a libel against One 1957 "Lincoln Premiere", Motor No. 57WA-7757L, pursuant to 49 U.S.C. 781 and 782, *supra*, pp. 2–3, on the ground that the vehicle had been employed to transport contraband heroin unlawfully (R. 4–6).[1] Petitioner, as claimant, answered the libel asserting that it was the actual owner of the seized vehicle under a conditional sales agreement with one Melvin Harris; and that after due inquiry prior to entering said agreement it did not know, nor could it have had reason to know, that Melvin Harris would utilize the vehicle in an illegal manner (R. 9–10).

At the hearing on the libel it was shown that a narcotics user, who named Harris as his source,

[1] "R." designates the government's appendix in the Court of Appeals. "App." designates petitioner's appendix in that court.

telephoned Harris on June 26, 1957, and arranged to purchase narcotics from him at 11:00 p.m. Police officers followed Harris between 10:30 and 11:00 p.m. and saw him enter the subject Lincoln automobile. After losing him in traffic, the officers proceeded to the rendezvous point and, as they approached, saw the Lincoln pull over to the curb. Harris thereupon got out and stood on the sidewalk adjacent to the automobile. He was placed under arrest, searched and found to possess heroin (Pet. 17–18; R. 40–44, 47–48).

Judge Perry granted the claimant's motion for judgment (R. 57–58), finding that the government had failed to establish probable cause for the libel. The rationale of the decision was that the evidence submitted by the United States in support of the seizure was circumstantial and insufficient when balanced against the claim of an innocent third party whose "innocence is wholly or in part due to the failure of the government to provide adequate warning * * * that the purchaser of the automobile is under suspicion of narcotics law violations" (R. 58–62, 61).

The Court of Appeals unanimously reversed, finding that the evidence of probable cause "is so clear and convincing" that, even assuming *arguendo* that a greater burden of establishing probable cause is placed upon the government where the claimant is innocent, that burden was amply met in this case (Pet. 20).

ARGUMENT

Petitioner does not here challenge the decision of the Court of Appeals that the evidence establishes

probable cause for the libel. It tenders for the first time in this Court the argument that the forfeiture provisions of 49 U.S.C. 781–782, as applied in this case, are unconstitutional. Petitioner contends that to libel an automobile owned under a conditional sales contract by a completely innocent claimant who ran a full credit check on the purchaser and could not, whatever its efforts, obtain adequate information concerning his past narcotics record, due to limitations put upon such disclosures by the United States, is to take petitioner's property without due process of law. It asks this Court to re-examine and overrule *Goldsmith-Grant Co.* v. *United States*, 254 U.S. 505, where, despite the conceded innocence of the claimant vendor, forfeiture of an automobile in which non-tax-paid liquor had been concealed was sustained under R.S. 3450.

1. While we do not believe that petitioner can properly raise the constitutional issue for the first time in this Court, the contention is in any event wholly unsupported. The cases are undeviating in holding that innocence of a claimant-intervenor is irrelevant to a forfeiture proceeding under 49 U.S.C. 781 *et seq.* The single question is whether the government has established probable cause.[2] See, *e.g.*, *Associates Investment Company* v. *United States*, 220 F. 2d 885, 887 (C.A. 5); *United States* v. *Andrade*, 181 F. 2d 42, 46

[2] There are only two exceptions provided for by the statute. They recognize innocence of the owner as a defense where the vehicle, vessel or aircraft is used as a common carrier or where the user of the vessel, vehicle or aircraft "acquired possession thereof in violation of the criminal laws of the United States or of any State".

(C.A. 9); *United States* v. *Gramling*, 180 F. 2d 498, 501 (C.A. 5); *United States* v. *One 1941 Plymouth Tudor Sedan*, 153 F. 2d 19 (C.A. 10); *United States* v. *One 1955 Ford Convertible*, 137 F. Supp. 830 (E.D. Pa.); *United States* v. *One 1952 Buick Special Riviera Automobile*, 136 F. Supp. 253 (D. Minn.); *United States* v. *One Oldsmobile Sedan*, 118 F. Supp. 450, 452 (E.D. La.); *United States* v. *One 1950 Chrysler Sedan New Yorker*, 117 F. Supp. 222 (W.D. Pa.).

The *Goldsmith-Grant* decision, moreover, has been reaffirmed by this Court. In *Van Oster* v. *Kansas*, 272 U.S. 465, 468, in sustaining the constitutionality of a state forfeiture statute, the Court relied upon that decision for the proposition that:

> It has long been settled that statutory forfeitures of property entrusted by the innocent owner or lienor to another who uses it in violation of the revenue laws of the United States is not a violation of the due process clause of the Fifth Amendment.

And most recently the Court cited the case as authority for "a legal remedy sanctioned by the long history of Anglo-American law." *Kingsley Books, Inc.* v. *Brown*, 354 U.S. 436, 444.

2. In any event, the issue posited by petitioner is not raised by this case. The contention is based on petitioner's claim that it could not have found out about Harris' prior narcotics involvements since there is no adequate information service set up by the government which lending institutions may utilize for that purpose, and the government is reluctant to

give out any such information at all. The record reveals, however, that petitioner made no attempt to check on Harris with the Bureau of Narcotics (R. 52; App. 9). In fact, as agent Newey testified, the Chicago office of the Bureau allocates over two hours each day to provide information to reputable financial institutions and informs inquirers whether individuals inquired about are mentioned in its files (R. 52; App. 7). The question here therefore is not whether the forfeiture statute is applicable to a claimant who did all it could to safeguard its investment, and was deprived of pertinent information by the government, but whether it is applicable to a claimant who failed to make a thorough investigation. For its failure in this regard, petitioner's application for administrative remission of forfeiture was denied. It cannot be granted such relief in a judicial proceeding. See, *e.g.*, *United States* v. *One 1941 Plymouth Tudor Sedan*, 153 F. 2d 19 (C.A. 10).

Although petitioner's contention that it is difficult to obtain information from the Bureau of Narcotics is supported by the findings of the district judge,[3] those findings, prepared by petitioner

[3] Finding of Fact No. 14 states (R. 60):

"That the great number of financial institutions in the Chicago area which finance the sales of automobiles and the short hours alloted by the Federal Narcotics Bureau for giving information as to suspected persons to those financial institutions make it almost impossible for those institutions to find out any information concerning prospective automobile buyers in regard to their status with the narcotics bureau. Furthermore the only information which is ever divulged by the bureau is that the person is under suspicion, and even that information is not always given to the financing institution."

See also Conclusion of Law No. 4 (R. 61).

at the direction of Judge Perry and thereafter approved by the Judge, were never challenged by the United States Attorney, who had no reason to do so. The district judge had found that the government failed to establish probable cause. Proceeding upon the proper assumption that probable cause was the only issue in the case and that the evidence did support a finding of probable cause, the position of the government on appeal was that the innocence or good faith of the claimant was immaterial. Moreover, in the court below petitioner made good faith an issue only insofar as it claimed that its existence placed a greater burden of proof of probable cause upon the government. The Court of Appeals, reversing the District Court, found that the evidence established probable cause. It thus had no occasion to deal with the question whether information could be obtained from the Narcotics Bureau.

In basing its argument of unconstitutionality on the findings of the district judge on the nonavailability of information, petitioner is not only raising an issue never raised below but is also basing it on facts which the government until now has never had reason to challenge or contradict. Against this background the issue is not properly before this Court. Cf. *Giordenello* v. *United States*, 357 U.S. 480, 484, n. 2.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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AUGUST 1959.

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